



ADVANCED CONSTITUTIONAL LAW:  
AMERICAN EQUALITY AND SUBSTANTIVE DUE PROCESS

Professor R. Colker

FALL 1988.

Faculty of Law  
University of Toronto

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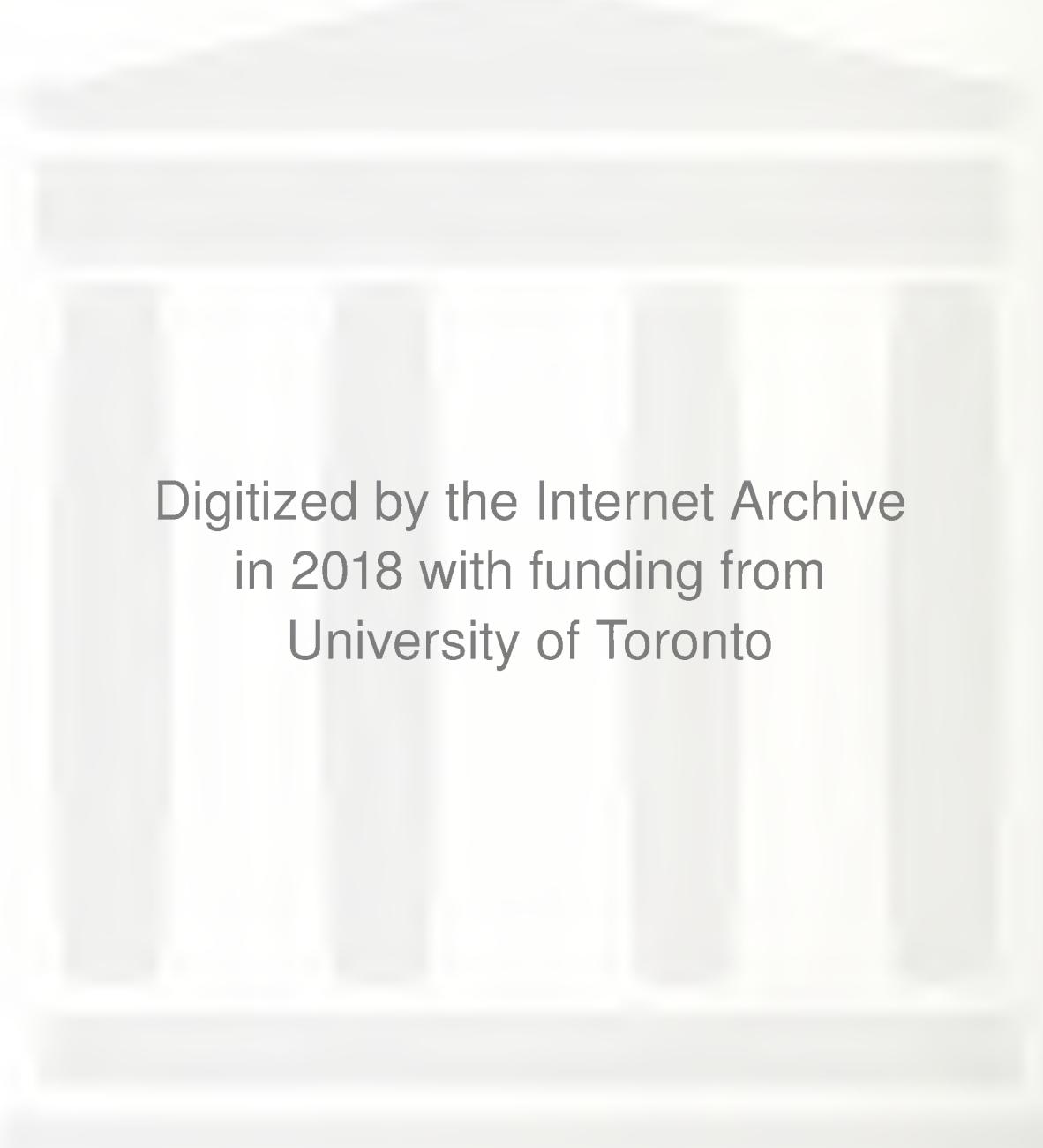
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**ADVANCED CONSTITUTIONAL LAW:**

**AMERICAN EQUALITY AND SUBSTANTIVE DUE PROCESS**

This course will focus on the question of how to define sex-based equality and enforce that conception of equality through constitutional law. I have chosen to focus on the question of sex-based equality because I believe that the unique biological capabilities of women, especially in the area of reproduction, make it especially difficult to define this type of equality.

This course will be divided into three sections. First, we will generally consider the role of law in enforcing substantive norms for equality. We will consider the general question of what rules of interpretation the Courts should use in interpreting the Constitution and how activist they should be in reviewing legislation.

Second, we will turn to the question of how to interpret the due process clause to protect women's rights in the area of reproduction. We will read the major abortion decisions from the United States and Canada and some commentary on those cases.

Third, we will consider how to interpret the equal protection clause to protect women's rights in the area of reproduction. Although the courts have generally not used the equal protection clause to resolve abortion cases, we will consider whether that clause could be used to analyze those cases.

We will discuss Part I during the first two class sessions. We will discuss one section of each of the remaining parts for the remainder of the course. The reading assignments will therefore be heavy but, hopefully, rewarding.



**PART I. THEORIES OF INTERPRETATION & JUDICIAL REVIEW**

1. United States Constitution - Amendments
2. Canada - Charter of Rights and Freedoms
3. Michael Perry, *Morality, Politics and Law* (forthcoming 1988) (excerpts)
4. John Hart Ely, *Democracy and Distrust* (1980) (excerpts)
5. S. Patrick Monahan, *Politics and the Constitution* (1987) (excerpts)
6. Robin Elliot, *Interpreting the Charter*, Univ. of British Columbia L. Rev. (Charter Ed. 1982)

**PART II. SUBSTANTIVE DUE PROCESS**

1. The Early Abortion Cases  
*Roe v. Wade*, 410 U.S. 113 (1973)  
*Doe v. Bolton*, 410 U.S. 179 (1973)
2. A Critique - John Hart Ely, *The Wages of Crying Wolf*, 82 Yale L.J. 920 (1973).  
A Defense - Alison Jaggar, *Abortion and a Woman's Right to Decide*
3. The Abortion Funding Cases  
*Harris v. McRae*, 448 U.S. 296 (1980)  
A Response - Michael Perry, *Why the Supreme Court was Plainly Wrong*, 32 Stanford Law Review 1113 (1980)
4. More Abortion Cases  
*Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)  
*H.L. v. Matheson*, 450 U.S. 398 (1981)  
*Akron v. Akron Center*, 462 U.S. 416 (1983)  
*Thornburgh v. American College of Obstetricians*, 106 S.Ct. 2169 (1986)



5. More Responses

Mary Ann Glendon, *Abortion Law in Abortion and Divorce Law in Western Law* (1987)

Lynn Paltrow, *Amicus Brief in Thornburgh, 9 Women's Rights L. Rep.* 3 (1986)

Rosalind Petchesky, *Fetal Images*, 13 Feminist Studies 263 (1987)

George Schedler, *Benign Sex Discrimination Revisited*, 15 Pepperdine L. Rev. 295 (1988)

6. The Canadian Decision - *Morganthaler v. Attorney General*

**III. EQUAL PROTECTION DOCTRINE**

1. Background Cases

*Washington v. Davis*, 426 U.S. 229 (1976)

*Personnel Administrator v. Feeney*, 442 U.S. 256 (1979)

2. The Pregnancy Cases

*Geduldig v. Aiello*, 417 U.S. 484 (1974)

*General Electric v. Gilbert*, 429 U.S. 125 (1976)

3. Some Responses

*Sylvia Law, Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984)

*Linda Krieger & Patricia Cooney, The Miller-Wohl Controversy*, 13 Golden Gate L. Rev. 513 (1983)

*Wendy Williams, Equality's Riddle*, 13 Rev. of L. & Soc. Change 325 (1984-85)

*Lucinda Finley, Transcending Equality Theory*, 86 Columbia L. Rev. 1118 (1986)

4. The Canadian Context

*Bliss v. The Attorney General*, 1 S.C.R. 183 (1979)

